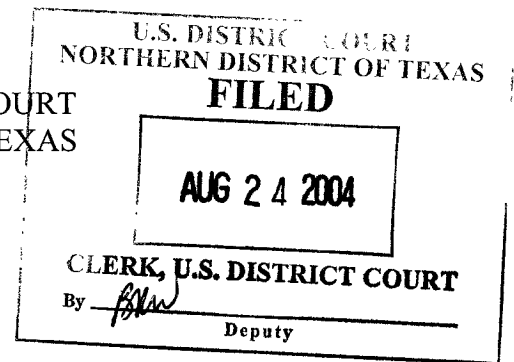


IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION



WILLIAM J. MURRAY,

Plaintiff,

v.

TXU CORP.,
TXU ENERGY COMPANY, L.L.C.,
TXU PORTFOLIO MANAGEMENT
COMPANY, L.P. f/k/a TXU ENERGY
TRADING COMPANY, L.P.,

Defendants.

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CIVIL ACTION NO:
3:03-CV-0888-P

ORDER

Now before the Court is Plaintiff William J. Murray's Expedited Motion for Leave to Amend and File First Amended Complaint and Jury Demand, filed June 23, 2004. Defendants TXU Corp., et al., filed their Response on July 6, 2004, and Plaintiff filed its Reply on July 9, 2004. After considering the parties' arguments and briefings, and the applicable law, the Court GRANTS Plaintiff's Motion for Leave to Amend.

I. Background and Procedural History

Defendant TXU Energy Trading Company LP, now known as TXU Portfolio Management Company LP ("TXU"), terminated Plaintiff on August 1, 2002. Plaintiff filed his Original Complaint in this case on April 28, 2003, and asserted two claims against Defendants: (1) retaliatory termination in violation of § 806 of the Sarbanes-Oxley Act, Pub. L. No. 107-204,

3:03-CV-0888-P

Order GRANTING Plaintiff's Motion for Leave to Amend and File First Amended Complaint and Jury Demand

Page 1

116 Stat. 802, *codified at* 18 U.S.C. § 1514A and (2) breach of contract for failure to pay salary incentive compensation under the terms of his Employment Agreement with TXU.

On March 12, 2004, this Court issued a Scheduling Order setting a trial date of April 4, 2005. The Scheduling Order requires Motions for Leave to Amend Pleadings to be filed by September 10, 2004 and sets a discovery deadline of November 10, 2004.

On June 9, 2004, Plaintiff began to depose VJ Horgan, the former President of TXU Energy Trading Co., L.P., Plaintiff's supervisor, and an individual identified by Defendants as being responsible for making the decision to terminate Plaintiff. Plaintiff asserts that Horgan testified to an intent of the NPV Bonus Plan ("Plan") that was inconsistent with the terms of the Plan and with representations made by Horgan to Plaintiff about the Plan. Plaintiff now believes he has a basis to pursue a fraud claim in addition to his breach of contract claim, and therefore seeks to amend his complaint.

II. Plaintiff's Motion to Amend

In *S&W Enterprises v. Southtrust Bank of Alabama* [hereinafter "S&W"], the Fifth Circuit made clear that "Federal Rule of Civil Procedure 16(b) governs amendment of pleadings once a scheduling order has been issued by the district court."¹ 315 F.3d 533, 535 (5th Cir. 2003). Therefore, at first glance, it appears as though Plaintiff's Amendment is governed by the higher standard of 16(b), rather than 15(a), and that a showing of good cause must be demonstrated. However, it is important to note that *S&W* dealt with facts whereby "leave to amend would [have] require[d] *modification* of the scheduling order." *Id.* at 536 (emphasis

¹ Rule 16(b) allows a scheduling order to be amended only upon a showing of "good cause and by leave of the district judge." Fed. R. Civ. Proc. 16(b).

added). In this case, Plaintiff does not seek to alter the scheduling order, but only to amend his complaint. Hence this Court does not find that Plaintiff be required to show good cause, but only that “justice so requires” such alteration.² *See* Fed. R. Civ. Proc. 15(a).

a. Rule 15(a)

Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend a pleading “shall be granted when justice so requires.” *Forman v. Davis*, 371 U.S. 178, 182 (1962). The decision to grant leave to amend lies within the discretion of the trial court. In determining whether to grant leave to amend, the court may consider several factors, including delay or prejudice to the non-movant, bad faith or dilatory motives on the part of the movant, repeated failure to cure deficiencies, and futility of amendment. *Id.* at 182. In its Response, Defendant’s only contention as to why Plaintiff’s Amended Complaint should be denied was due to failure to plead fraud with heightened particularity.

1. Plaintiff has Plead Fraud with Appropriate Particularity

Unlike the general notice pleading required by Rule 8(a), a claim of fraud must “be stated with particularity.” Fed. R. Civ. Proc. 9(b); *see also American Realty Trust, Inc. v. Hamilton Lane Advisors, Inc.*, 2004 WL 1551616, at *4 (5th Cir. July 7, 1991). In order to plead fraud, a party is required to set forth the “who, what, when, where, and how” of the alleged fraud. *United States ex rel. John Doe v. Dow Chemical* [hereinafter “Dow Chemical”], 343 F.3d 325, 328 (5th Cir. 2003) (internal citations omitted). Fraud claims that do not meet the strict

² Nonetheless, even if Plaintiff *were* required to demonstrate good cause, this Court finds sufficient facts to prove such a showing. Namely, that Plaintiff first learned of possible fraud claims against Defendant during the commencement of Horgan’s deposition on June 9, 2004, that such discovery occurred well before the required time of completion for discovery procedures, and that Plaintiff acted without delay in pursuing its inquiry.

pleading requirements of Rule 9(b) are dismissed under Rule 12(b)(6) for “failure to state a claim [upon which relief can be granted.]” *See Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1021 (5th Cir. 1996). However, where the facts relating to fraud are “peculiarly within the perpetrator’s knowledge,” a court may then relax the pleading requirements of Rule 9(b). *Id.* at 330 (internal citations omitted).

Defendant claims that Plaintiff has not met his requisite burden because many, if not all of Plaintiff’s Amended Complaint paragraphs do not “how or why the alleged statement was false,” or give necessary detail as to “the time or place where the statement was made.” However, taken as a *whole*, Plaintiff’s Amended Complaint does meet the requirements set forth by *Dow Chemical*: alleging that Horgan is the individual acting with actual or apparent authority for the Defendant (who), Am. Compl. ¶¶ 116, 118, 199(B), 129(B), 143-45, 161-63, and 165; that the fraud claim is based upon material misrepresentations made to Plaintiff by Horgan (what), Am. Compl. ¶ 162; that dates of material misrepresentations are specifically given (when), *see* Am. Compl. ¶¶ 116, 118, 143 and 145; that such claims of misrepresentation occurred through email, conversations and meetings (where), Am. Compl. ¶¶ 116, 118, 143 and 145; and that Horgan made promises and representations about Defendant’s Plan (how), Am. Compl. ¶¶ 118, 119(A), 129(B), 143-45. Although the complete minutiae of alleged fraud is not yet known, Plaintiff provides sufficient detail at this point.

Moreover, courts have recognized that the degree of particularity required is dependent upon the facts and circumstances of the individual case. *See Guidry v. Bank of LaPlace*, 954 F.2d 278, 288 (5th Cir. 1992) (“what constitutes ‘particularity’ will necessarily differ with the

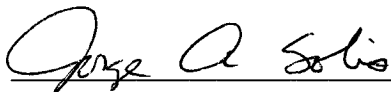
particularity and that defendants will be able to respond meaningfully. *Cf. Guardian Underwriters, L.L.P.*, 2003 WL 22077945, at *3 (N.D. Tex. Sept. 2, 2003) (noting that a “purpose of the particularity requirement is to provide defendants with fair notice of the plaintiff’s claims”). In sum, Plaintiffs have pled fraud with sufficient particularity under the heightened requirements of Rule 9(b).

III. Conclusion

For the foregoing reasons, Plaintiff’s Expedited First Motion for Leave to Amend and File First Amended Complaint and Jury Demand is GRANTED.

It is so ordered.

Signed this 24th day of August 2004.



JORGE A. SOLIS

UNITED STATES DISTRICT JUDGE